

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOHN TA</b>	:	DETERMINATION
	:	DTA NO. 819482
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New	:	
York City Administrative Code for the Year 1997.	:	

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Petitioner, John Ta, 313 Los Padres Lane, Placentia, California 92870, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1997.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 14, 2004 at 10:45 A.M., with additional evidence due by October 14, 2004, which date began the three-month period for the issuance of this determination. Petitioner appeared by his father, Tai Van Ta, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan L. Parker).

***ISSUE***

Whether petitioner has proven that one of his New York City employers during the year at issue withheld income tax from his wages which was then remitted to New York.

***FINDINGS OF FACT***

1. Although petitioner, John Ta, was employed by two New York City employers, Leafstone, Inc. and GT Payroll,<sup>1</sup> during 1997, he did not file a New York income tax return.

2. The Division of Taxation (“Division”) issued a Statement of Proposed Audit Changes dated June 22, 2001 asserting total New York State and City income tax due for 1997 of \$2,723.00 plus penalty<sup>2</sup> and interest. This statement provided a detailed explanation, in relevant part, as follows:

We do not have a record of a 1997 New York State income tax return on file for you. You did not reply to our previous letters asking about your New York return.

Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information shows you filed a federal income tax return using a New York State address.

We used the information from your federal return and computed your tax as a New York resident. . . .

\* \* \*

Since the address on your federal return shows your residence was in New York City, we have also computed City of New York resident tax.

We will allow additional payments if your 1997 tax withheld from wages or estimated tax payments are greater than the amounts shown on this bill. Please furnish a wage and tax statement or canceled check showing a larger amount.

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<sup>1</sup> Petitioner’s New York City employers during 1997 were referred to as “Leaston (Morgan Stanley)” and “Temporary Alternatives (representing employer Dean Witter at the World Trade Center)” in the petition. At the hearing, petitioner’s representative, his father, Tai Van Ta, referred to the two employers with the names indicated above.

<sup>2</sup> Late filing penalty under Tax Law § 685(a)(1) and negligence penalties under Tax Law § 685(b)(1) and (2) were imposed.

The statement also provided the following calculation to show how total tax due of \$2,723.00 was computed:

Total Federal adjusted gross income	\$36,461.00
New York adjusted gross income	36,461.00
NYS standard deduction	(7,500.00)
New York taxable income	28,961.00
NYS tax	1,588.00
City of New York resident tax	1,135.00
Total NYS and NYC tax	\$ 2,723.00

Total Federal adjusted gross income of \$36,461.00 was reported on petitioner's 1997 Federal income tax return based upon wages received of \$41,463.00 less a Schedule C loss claimed of \$5,002.00.

3. The Division issued a Notice of Deficiency dated August 16, 2001 against petitioner asserting total income tax due for 1997 of \$2,723.00, plus penalty and interest, and this notice referenced the earlier Statement of Proposed Audit Adjustment detailed in Finding of Fact "2".

4. By a Conciliation Order dated February 14, 2003, tax asserted due of \$2,723.00, plus penalty and interest, was reduced to \$674.14, plus penalty and interest, based upon 1997 New York income tax withheld from petitioner's wages by Leafstone, Inc. in the amount of \$2,048.00.

5. After conducting a search of its records, the Division was unable to verify any additional withholding for petitioner for the year 1997.

6. At the hearing, petitioner requested and was granted additional time until October 14, 2004 to provide proof of additional withholding for the year 1997. However, no additional proof was submitted for review.

### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 651, a New York personal income tax return “shall be made and filed” on or before April 15<sup>th</sup> following the close of the taxable year.” Here, petitioner failed to file a New York personal income tax return for 1997. This failure has resulted in petitioner’s facing the problem of proving, *six years* later, that income tax was withheld from his New York wages by GT Payroll. As noted in Finding of Fact “5”, the Division, after conducting a search of its records, was unable to verify that this former employer of petitioner actually withheld and remitted income tax on his wages for 1997.

B. Despite being provided with a generous amount of time to obtain such proof, petitioner has not been able to do so.<sup>3</sup> Since the burden of proof is upon petitioner to establish such fact, his petition must fail (*see, Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398; *Matter of Riad*, Tax Appeals Tribunal, October 2, 2003).

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<sup>3</sup> There is some indication in the record that such inability relates to the loss of records in the destruction of the World Trade Center on September 11, 2001. In his petition, Mr. Ta stated that the employer from whom he is unable to obtain a copy of his W-2 for 1997 “employed petitioner at the World Trade Center.”

C. The petition of John Ta is denied, and the Notice of Deficiency dated August 16, 2001, as modified by the Conciliation Order dated February 13, 2003, is sustained.

DATED: Troy, New York  
November 24, 2004

/s/ Frank W. Barrie  
PRESIDING OFFICER